Supreme Court, U.S.
FILED
JUL 10 1992
OFFICE OF THE CLERK

No. 91-904

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC.,
Petitioner,

v.

CONSTRUCTION LABORERS PENSION TRUST
FOR SOUTHERN CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMERICAN TRUCKING ASSOCIATIONS, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF AMERICAN TRUCKING ASSOCIATIONS, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The American Trucking Associations, Inc. ("ATA") is the national trade association of the trucking industry, which includes more than 31,000 carriers regulated in interstate commerce. Many of these firms contribute to multiemployer pension plans and are thus subject to withdrawal liability under the Multi-

employer Pension Plan Amendments Act of 1980 ("MPPAA"), 94 Stat. 1208, as amended, 29 U.S.C. §§ 1381-1461. MPPAA makes an employer that withdraws from a multiemployer plan liable for an allocable share of the plan's unfunded vested benefit liability, even if the employer has complied with all of its obligations under the collective bargaining agreement.

This novel statutory liability has had a serious impact on the trucking industry. A significant number of the largest plans that ATA members contribute to are underfunded. A single large Teamsters plan, the Central States Southeast and Southwest Areas Fund, had an unfunded vested benefit liability of nearly $1.7 billion at the end of 1990.[1] According to a 1984 report of the Comptroller General, in just the first few years of MPPAA, five plans with substantial trucking industry participation had assessed withdrawal liability of $24.8 million against 88 employers, an average of more than $280,000 per employer.[2]

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[1] *Central States Southeast and Southwest Areas Health & Welfare Funds: 1990 Annual Report* at 5.

[2] *Report to the Congress: Assessment of Special Rules Exempting Employers Withdrawing From Multiemployer Pension Plans From Withdrawal Liability* 25 (GAO/HRD-84-1 May 14, 1984). Although MPPAA contains special provisions intended to ameliorate the withdrawal liability of employers in the trucking industry, 29 U.S.C. § 1383(d), the requirement that "substantially all" of the plan's contributions come from trucking industry employers has meant that hardly any plans qualify for the special treatment. *Id.* at 24-25; *Continental Can Co., Inc. v. Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund*, 916 F.2d 1154 (7th Cir. 1990).

The trucking industry has been particularly hard-hit by withdrawal liability because of the Motor Carrier Act of 1980 ("MCA"), 94 Stat. 793. That Act substantially deregulated the trucking industry and has caused a significant increase in both nonunion and union competition. It thus has forced a major restructuring of the unionized portion of the industry. Yet, MPPAA, enacted only 87 days after MCA, penalizes the very actions—motor carrier acquisitions, reorganizations, and dissolutions—necessary for such an industry-wide restructuring.

ATA believes that, at minimum, the Due Process Clause of the Fifth Amendment gives withdrawing employers the right to a determination of their potentially ruinous MPPAA liability by a neutral and detached decisionmaker, a right the MPPAA scheme denies them. ATA therefore files this brief urging reversal of the judgment of the Court of Appeals.[3]

SUMMARY OF ARGUMENT

Through MPPAA, Congress gave multiemployer pension plans a wholly new private right against employers withdrawing from such plans. Specifically, Congress made a withdrawing employer liable to the plan for its allocable share of the plan's unfunded vested benefits. 29 U.S.C. § 1381(b). The procedures established by Congress for the vindication of this private right to monetary compensation are extraordinary. The pension plan itself, through its trustees, decides whether a withdrawing employer is liable to

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[3] This brief is filed with the written consent of the parties. The letters of consent have been filed with the Clerk of the Court.

the plan under MPPAA, and assesses the amount of that liability. *Id.* § 1382.

In making that determination, the trustees owe a strict fiduciary duty to the plan, *id.* § 1002(21)(A), and can be held personally liable for breaching that duty. *Id.* §§ 1109, 1132. The statute thus predisposes the trustees to maximize the employer's withdrawal liability as a way of maximizing the plan's assets.

To challenge the trustees' inherently biased findings, the employer is relegated to an arbitration proceeding in which those findings are "*presumed correct* unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous." *Id.* § 1401(a)(3)(A) (emphasis added).

MPPAA thus places extraordinary decisionmaking power in the hands of the very private party that stands to benefit; it presumes the correctness of the necessarily biased liability determinations of that party's trustees; and it insulates those tainted determinations from a searching, *de novo* review by a disinterested decisionmaker. A withdrawing employer is thus denied a fair, impartial, and objective assessment of its liability. The scheme provides neither "a neutral and detached judge in the first instance," *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972), nor *de novo* review by an impartial and disinterested tribunal, *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-43 (1980). MPPAA thus violates the Due Process Clause.

ARGUMENT

I. THE TRUSTEES OF THE PLAN ARE NOT "NEUTRAL AND DETACHED" DECISIONMAKERS.

Because an assessment and collection of withdrawal liability deprives an employer of property, the employer is entitled to due process. Due process requires at a minimum an impartial decisionmaker: "That officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is of course the general rule." *Tumey v. Ohio*, 273 U.S. 510, 522 (1927). In determining whether a decisionmaker is biased, there initially is a presumption of impartiality. *Schweiker v. McClure*, 456 U.S. 188, 195 (1982). The presumption, however, "can be rebuttted by a showing of conflict of interest or some other specific reason for disqualification." *Id.*

To rebut the presumption, it need only be shown that the decisionmaker is *potentially* subject to such disqualifying interests, not that the decisionmaker was *actually* biased.[4] "Not only is a biased decisionmaker constitutionally unacceptable, but 'our system has always endeavored to prevent even the probability of unfairness.'" *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (quoting *In re Murchison*, 349 U.S. at 136). This requires a "realistic appraisal of psychological tendencies and human weaknesses." *Id.*

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[4] *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (Court not required to decide whether decisionmaker "in fact . . . was influenced" by possible temptation to bias); *In re Murchison*, 349 U.S. 133, 136 (1955) (no need to show "actual bias"); *Tumey v. Ohio*, 273 U.S. at 532 (Due Process Clause prohibits any "procedure which would offer a possible temptation to the average man . . . or which might lead him not to hold the balance nice, clean and true . . . .").

This Court has identified a number of disqualifying influences: direct pecuniary interest of the decisionmaker in the outcome, *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973); *Tumey v. Ohio*, 273 U.S. at 523; a combination of statutory duties with the quasi-judicial function which creates a "possible temptation" for the decisionmaker to render his decision for partisan reasons, *see Ward v. Village of Monroeville*, 409 U.S. at 60; or the decisionmaker's prior involvement in the matter under consideration, *Schweiker v. McClure*, 456 U.S. at 192; *Offutt v. United States*, 348 U.S. 11 (1954). Plan trustees under the MPPAA scheme are subject to all of these disqualifying influences.

A. The Plan Trustees' Assessment of Withdrawal Liability Is Tainted By The Plan's Manifest Pecuniary Interest in the Outcome.

This Court has stated that "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. at 136. Under the MPPAA scheme, however, the plan, through its trustees, is permitted to do exactly that.

This Court has held decisionmakers to be impermissibly biased where their pecuniary interest is far more attenuated than the multiemployer pension plan's interest in receiving withdrawal liability payments. In *Gibson v. Berryhill*, *supra*, this Court affirmed the finding of a three-judge district court that the Alabama Board of Optometry, a body composed of optometrists in private practice, could not hear a license revocation proceeding against other optometrists because, if the licenses were revoked, "the individual members of the Board, along with other private practitioners of optometry, would fall heir to this business."

411 U.S. at 571. Obviously, the ability of Board members to capitalize on the revocation of other practitioners' licenses was contingent on numerous intervening events.

In the present case, the pecuniary gain to the plan assessing an employer's withdrawal liability is immediate, substantial and contingent only on the liquidity of the employer. *A fortiori*, the plan's pecuniary interest renders it impermissibly biased.

Although Congress may, consistent with due process, delegate adjudicative functions to a private party, in MPPAA Congress impermissibly placed those functions in the hands of a private party which stands to benefit from the assessment of withdrawal liability and which is not employed by the government—the multiemployer pension plan itself. Thus, the instant case is quite unlike *Schweiker v. McClure*, 456 U.S. 188 (1982), where the Court upheld a congressional delegation of adjudicative functions to private insurance carriers because the Medicare plans being adjudicated were paid entirely out of government funds, and because the carriers were employed and compensated by the government pursuant to contracts requiring them to adhere to detailed regulations. Here, in contrast, the party to which adjudicative power is delegated will pocket the amounts assessed, and it cannot be "fired" by the government for overreaching.

B. The Plan Trustees Are Biased Decisionmakers By Virtue of Their Statutory Role as Fiduciaries of the Plan.

"All of the trustees, including those selected by employers, are fiduciaries of the fund, 29 U.S.C. § 1002 (21) (A), and thus owe an exclusive duty to the fund."

Yahn & McDonnell, 787 F.2d 128, 138-39 (3d Cir. 1986), *aff'd by an equally divided Court*, 481 U.S. 735 (1987).

> Under principles of equity, a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties. To deter the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalties must be enforced with "uncompromising rigidity."

NLRB v. Amax Coal Co., 453 U.S. 322, 329-30 (1981). Trustees are personally liable to the fund for breach of these "strict fiduciary obligations." 29 U.S.C. §§ 1109, 1132; *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 139-143 (1985).

This legal framework ensures that trustees exercise every effort to maximize the assets available to a pension plan. The legislative history demonstrates that Congress expected pension plans, in enforcing the withdrawal liability provisions, to act as ordinary litigants concerned with "maximizing the total ultimate recovery":

> We do not intend to restrict plan sponsors' prudent exercise of judgment in administering the withdrawal liability provisions generally. It is expected that plan trustees will need to make practical collection decisions which are consistent with their fiduciary duties and characteristics of any responsible creditor concerned with maximizing the total ultimate recovery at supportable costs.[5]

[5] 126 Cong. Rec. 29,255 (1980) (statement of Senator Williams, MPPAA co-sponsor).

Congress thus contemplated that plan trustees, as an inherent consequence of their fiduciary duties, would act to maximize withdrawal liability. Individuals with such statutory duties cannot be presumed impartial in quasi-judicial decisions. *See Schweiker v. McClure*, 456 U.S. at 195.

While Congress did state that failure to maximize withdrawal liability is not a *per se* violation of fiduciary duty,[6] the very fact that it can be a violation at all renders the trustees' decision something other than "neutral and detached." This Court has concluded that fear of lawsuit can improperly interfere with judicial decisionmaking. *Stump v. Sparkman*, 435 U.S. 349, 363-64 (1978); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872). By the same token, a private party that is subject to lawsuit for his decisions cannot be expected to act without considering the personal consequences. In addition, since plan trustees are, when assessing withdrawal liability, often dealing with the consequences of their prior decisions that resulted in underfunding, their prior involvement in the matters at issue is further reason to doubt their objectivity.[7]

[6] H.R. Rep. No. 869, pt. I, 96th Cong., 2d Sess. 67, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2918, 2935.

[7] *Cf. Morrissey v. Brewer*, 408 U.S. 471, 485-86 (1972) (due process requires that supervising parole officer not determine whether reasonable grounds exist for revocation of parole; "realistically the failure of the parolee is in a sense a failure for his supervising officer."). As in *Morrissey*, this "is not an issue limited to bad motivation," 408 U.S. at 486 n.14, but rather simply a "realistic appraisal of psychological tendencies and human weakness." *Withrow v. Larkin*, 421 U.S. at 47.

It is not sufficient to argue, as some have, that reducing withdrawal liability to encourage future employer participation in the plan might also be consistent with the trustees' fiduciary duty. *Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Industry Pension Fund, Inc.*, 762 F.2d 1137, 1142-43 (1st Cir. 1985) (en banc). A risk-averse trustee would certainly be more concerned with being "second-guessed"—by way of a lawsuit for breach of fiduciary duty—for letting a withdrawing employer get away cheap than for discouraging some hypothetical future employer from entering the plan. The speculation that "manifest bias will not always result in gross injustice to employers" does not save the statutory scheme:

> It seems an odd principle to determine the permissibility of manifest bias by weighing the decisionmaker's conflicting interests in the scale of justice and finding which side predominates.[8]

The possibility that some inherently biased persons vested with decisionmaking authority will demonstrate fairness and statesmanship, and will show great foresight, is not sufficient. The procedure must be judged by whether it might lead "the *average* man . . . not to hold the balance nice, clean and true . . . ." *Tumey v. Ohio*, 273 U.S. at 532 (emphasis added). Under this standard, the MPPAA scheme clearly violates the Due Process Clause.

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[8] *Keith Fulton & Sons, Inc. v. New England Teamsters Pension Fund, Inc.*, 762 F.2d 1137, 1149-50 (1st Cir. 1985) (en banc) (Aldrich, J., dissenting).

II. UNDER THE STATUTORY SCHEME, THE EMPLOYER AT NO POINT RECEIVES *DE NOVO* ADJUDICATION OF ITS WITHDRAWAL LIABILITY ASSESSMENT.

Due process requires that a citizen have the right to a trial *de novo* before a neutral and detached decisionmaker. *Ward v. Village of Monroeville*, 409 U.S. at 60-61; *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-43, 245 (1980). *Ward* held that due process requires a neutral and detached judge in the first instance, and even *de novo* review will not cure the failure to provide one. 409 U.S. at 61-62. *Marshall v. Jerrico* held that where the initial determination of liability was made by a party with enforcement rather than judicial responsibilities, trial *de novo* "of all factual and legal issues" preserved the statutory scheme. 446 U.S. at 245 (emphasis added); *see also Withrow v. Larkin*, 421 U.S. 35, 58 (1975) ("substantial due process question would be raised" if "nonadversarial processes . . . foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision").

MPPAA's presumption of correctness completes the deprivation of due process by shielding the initial determination, which is made by an interested decisionmaker, from *de novo review*. At no point does an employer receive the trial *de novo* before an impartial decisionmaker guaranteed by the Constitution. In an arbitration, the employer's proof must do more than show that the plan's determination was erroneous or less reasonable than the employer's position; the employer must prove that the determination was "unreasonable or clearly erroneous." 29 U.S.C. § 1401 (a)(3). Thus, even if the arbitrator were to find by a preponderance of the evidence that the plan's determi-

nation was *merely* erroneous, but not *clearly* erroneous, the arbitrator would be bound to defer to the plan. In this complicated and unsettled area, such clarity of error will seldom be apparent.[9] Even if the arbitrator found *some* of the actuarial assumptions unreasonable, and that they were applied erroneously, the arbitrator would be bound to uphold the determination of the unfunded vested benefits if the assumptions were not unreasonable *in the aggregate* and there was no *significant* error in their application.[10]

The virtually dispositive force of the presumption can be seen in arbitrations where it is invoked in almost talismaniac fashion to avoid searching consideration of disputed questions of fact.[11] That arbi-

[9] *See, e.g., Trustees of the Pressman Local 72 Industry Pension Fund v. Judd & Detweiler, Inc.*, 736 F. Supp. 1351 (D. Md. 1988), wherein the district court vacated an arbitrator's decision rejecting the plan's interest rate assumption because it "merely substituted his own judgment for that of the trustees," despite the fact that the arbitrator acknowledged the presumption in favor of the plan's determination and made specific findings that the plan's determination was unreasonable.

[10] *Cf. Combs v. Classic Coal Corp.*, 931 F.2d 96 (D.C. Cir. 1991) (arbitrator's decision in favor of employer set aside even though his finding that plan's interest rate assumption was unreasonable was well supported).

[11] *See, e.g., Coal Drilling Services, Inc. & UMW 1974 Pension Plan*, 5 Employee Benefits Cas. (BNA) 1833, 1835 (Arb. 1984); *UMW 1974 Pension Plan & Williamson Shaft Contracting Co.*, 6 Employee Benefits Cas. (BNA) 1593, 1604 (Arb. 1985); *Hertz Corp. v. Commission Salesmen, Drivers & Helpers Local 187 Pension Fund*, 4 Employee Benefits Cas. (BNA) 1367, 1380-81 (Arb. 1983); *Palmer Coking Coal Co. & UMW 1950 & 1974 Pension Plans*, 5 Employee Benefits Cas. (BNA) 2369, 2383 & n.6 (Arb. 1984). In *Hertz*, the arbitrator resolved the disputed issue on the basis of the presumption even though the company's position had "a certain undeniable plausibility." 4 Employee Benefits Cas. (BNA) at 1381. The arbitrator in *Palmer Coking* described the presumption as imposing "rigorous standards of arbitral review." *Palmer Coking*, 5 Employee Benefits Cas. (BNA) at 2383 & n.6.

trators have in some instances revised plan determinations does not prove that the system is fair, only that the unfairness does not *guarantee* a result adverse to the employer in *every* case. Presumably the Mayor of Monroeville did not impose a fine in every case that came before him. One challenging a procedure as violative of Due Process does not have the burden of showing "special prejudice in [the] particular case." Such a burden "requires too much and protects too little." *Ward v. Village of Monroeville*, 409 U.S. at 61. The challenger need only show a systemic deprivation of a fair, *de novo* hearing. *Cf. In re Murchison*, 349 U.S. at 136 ("[O]ur system of law has always endeavored to prevent even the probability of unfairness.").

Presumptions created by civil statutes must exhibit "'some rational connection between the fact proved and the ultimate fact presumed, and . . . the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.'" *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976) (quoting *Mobile, J. & K.C.R.R. v. Turnipseed*, 219 U.S. 34, 43 (1910)). Here, the presumption infers the correctness of a given determination of withdrawal liability simply from the fact that the determination was made by the plan. One would be hard pressed to invent a plausible reason why the determination of an obligation should be presumed correct when the determining has been done unilaterally by the obligee. The legislative history makes it

clear that Congress had no empirical or logical justification for the statutory presumption; rather, Congress simply wanted to favor plans over employers and expedite proceedings in an area where there is a wide divergence of viewpoints.[12] Absent some better justification than mere expediency, the presumption violates due process.

III. THE ACT GIVES THE PLAN AND ITS TRUSTEES FULL POWER TO EFFECTUATE THEIR BIAS.

The foregoing discussion has shown that a plan, through its trustees, cannot be unbiased for purposes of performing a quasi-judicial decisionmaking role. It has been argued that, nonetheless, the trustees have no ability to put their bias into effect because the calculation of withdrawal liability is essentially ministerial. *See, e.g., Yahn & McDonnell*, 787 F.2d at 145 (Seitz, J., dissenting). An examination of a plan's powers under the Act demonstrates the contrary. The plan trustees have wide latitude to effectuate their bias in determining both the existence and the amount of withdrawal liability, especially through the determination of the expected rate of return on assets.

A. The Issue Whether MPPAA Applies At All Is A Fact-Sensitive, Case-By-Case Determination Made By The Plan.

The numerical calculation of withdrawal liability is only a small part of the plan's determinations. The presumption of correctness that was declared unconstitutional by the court of appeals in *Yahn* applies to

[12] *The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis*, 98th Cong., 2d Sess. 21 (1980); H.R. Rep. No. 869, pt. I, 98th Cong., 2d Sess. 1, 86 *reprinted in* 1980 U.S. Code Cong. & Admin. News 2918, 2954.

"any determination . . . under sections 1381 through 1399 of this title and section 1405." 29 U.S.C. § 1401(a)(3)(A). In the present case the single most difficult issue, decided in the first instance by the plan trustees, is *when* the withdrawal occurred, *i.e.*, when the employer had "permanently cease[d]" having an obligation to contribute or "permanently cease[d] all covered operations." *Id.* § 1383(a). Among the other factual matters determinable under these sections are:

- Whether an employer had "an obligation to contribute" to a plan. *Id.* §§ 1383(a), 1392. *See ILGWU National Fund v. Levy Brothers Frocks*, 846 F.2d 879 (2d Cir. 1988).
- Whether a sale of assets is protected from the imposition of withdrawal liability. *Id.* § 1384. *See Chicago Truck Drivers Pension Fund v. Louis Zahn Drug Co.*, 890 F.2d 1405 (7th Cir. 1989).
- Whether the "principal purpose of any transaction is to evade or avoid liability" and therefore should be disregarded. *Id.* § 1392(c). *See Banner Industries v. Central States Pension Fund*, 875 F.2d 1285 (7th Cir. 1989).
- Whether a change in business form is to be considered a withdrawal. *Id.* § 1398(1). *See Connors v. B&W Coal Co.*, 646 F. Supp. 164 (D.D.C. 1986).
- Whether an employer's cessation of contributions during a labor dispute constituted a complete withdrawal or was within the statute's "labor dispute" exception. *Id.* § 1398(2). *See Combs v. Adkins & Adkins Coal Co.*, 597 F. Supp. 122 (D.D.C. 1984).

That the presumption applies to factual determinations, rather than legal determinations, only begs the question. A plan has tremendous discretion in individual cases to determine that an exception or provision does or does not apply. This individualized, case-specific decision can eliminate withdrawal liability altogether or impose liability without a proper basis. Withdrawal liability in its simplest terms is a statutorily created debt running from one private party to another; adjudication of such private rights is the quintessential function of the judiciary. *See Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 591 (1985) (adjudication which subjects unwilling defendant to judicial enforcement encroaches upon judicial powers). The requirement that the decision-maker be neutral and detached therefore applies.

B. The Calculation of Withdrawal Liability Is Not a Ministerial Act, But Rather Has Discretionary Elements That Give a Plan Broad Leeway to Maximize Liability.

The statute permits a plan broad discretion in the assumptions and data employed in the calculation of withdrawal liability, and the calculation is, thus, far from ministerial. A plan may use any actuarial assumptions and methods, so long as they "in the aggregate, are reasonable." 29 U.S.C. § 1393(a)(1). The Pension Benefit Guaranty Corporation ("PBGC") cannot require a plan to use any particular assumptions or methods. *Id.* § 1393(a). A plan need not obtain complete data, but rather may "rely on the data available or on data secured by a sampling which can reasonably be expected to be representative of the status of the entire plan." *Id.* § 1393(b)(2). These

provisions permit wide variation among plans in the actuarial determinations. As set forth below, such determinations involve as much "art" as "science."

The General Accounting Office's ("GAO") *Report to the Congress: Effects of Liabilities Assessed Employers Withdrawing From Multiemployer Pension Plans* (GAO/HRD-85-16, Mar. 14, 1985) confirms the extent of potential actuarial variation. The Report notes that assumptions can vary significantly among actuaries, yet "[n]otwithstanding the variables inherent in the determination of a plan's withdrawal liability, MPPAA provides that a plan's determination is presumed correct in disputes resulting in arbitration unless the employer can show that it is unreasonable or in error." *Id.* at 24. The GAO Report concludes:

> Notwithstanding the appropriateness of different actuarial assumptions for different plans, the calculations of a plan's unfunded actuarial liability involves considerable judgment by the actuary concerning future uncertainties. Because of such uncertainties, the actuary's estimates of future returns on a plan's investments could result in determinations of liabilities that could be inequitable to the withdrawing employers.[13]

Actuaries themselves confirm the complexity of the withdrawal liability calculation and the potential variation in liability based on the assumption used. The senior actuarial adviser on the policy and planning staff of the PBGC has noted "unanswered questions," "potential sources of controversy," and "theoretical

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[13] *Id.* at 33 (emphasis added).

incongruities" in the calculation of withdrawal liability.[14]

Perhaps the most important actuarial assumption is the interest rate assumed for calculating the future return on plan investments. Assuming a lower rate of return on assets will increase the amount of assets needed to achieve actuarial goals. A plan's unfunded vested benefits can vary dramatically according to the rate used. As an actuarial rule of thumb, the cost of funding benefits increases by 24% for each 1% decrease in the interest rate assumption.[15] *See Judd & Detweiler, supra*, 736 F. Supp. at 1353 (use of 6% interest rate instead of 6.5% increased employer's withdrawal liability from zero to $132,775). The actuary's valuation of plan assets, another area where there is a wide divergence of respectable views, may also have a significant impact on an employer's withdrawal liability.[16]

"The actuary's role under MPPAA is a difficult and precarious one." Brennan, *Multiemployer Plan Withdrawal Liability: An Actuary's View*, Pension World 41, 44 (Oct. 1982). Far from being a purely ministerial task, the actuary's determination involves sensitive and complicated questions of tradeoffs, "not

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[14] Amoroso, *Withdrawal Liability*, Employee Benefits J. 2, 4, 26 (June 1982).

[15] *Pension Plan Underfunding: Hearing Before the Subcommittee on Oversight and the Subcommittee on Social Security of the House Committee on Ways and Means*, 99th Cong., 2d Sess. 13 (June 24, 1986).

[16] *See Masters, Mates & Pilots Pension Plan v. USX Corp.*, 900 F.2d 727 (4th Cir. 1990); *Huber v. Casablanca Industries Inc.*, 916 F.2d 85, 93 (3d Cir. 1990).

exclusively in the technician's domain."[17] Because the actuary is retained by the plan, any discretionary matters will usually be resolved in the plan's favor. If not, the plan is free to change actuaries or to employ its own actuarial assumptions.[18]

Plans are free to shop for the actuaries whose "philosophy" best fits their own and to make decisions on the major elements of the liability calculation. But the employer is never permitted effectively to challenge any of these choices before a neutral and detached decisionmaker.

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[17] Amoroso, *supra*, at 6.

[18] This reality is starkly illustrated in *Huber v. Casablanca Industries Inc.*, 916 F.2d 85, 93 (3d Cir. 1990), where the plan's actuary, Mr. Halliwell, initially valued the assets of the plan at $14 million. The minutes of the next trustees' meeting state:

> The Board expressed its concern over Mr. Halliwell's method of calculating withdrawal liability . . . The Board expressed lack of confidence in the calculation and Mr. Halliwell's advice. The Board agreed that it should consider other actuaries at the next Board of Trustees meeting, to provide services to the Fund including a final calculating of withdrawal liability in accordance with the statute.

"Within a few days," the Third Circuit noted, "both Halliwell's advice and the Board's opinion of him had changed." During the intervening time, Halliwell had substantially reduced his valuation of the plan's assets, and thereby increased the withdrawal liability.

CONCLUSION

For the reasons set forth above, the Court should reverse the judgment of the United States Court of Appeals for the Ninth Circuit. Because the presumption of correctness of pension plan trustees' determinations, 29 U.S.C. § 1401(a)(3), is severable from the remainder of MPPAA, *Yahn & McDonnell*, 787 F.2d at 144, the case should be remanded for arbitration with no presumption in favor of the trustee's determinations.

Respectfully submitted,

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July 10, 1992